1-454

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~511~~. 91

THE GRAND TRUNK RAILWAY COMPANY OF CANADA, PLAINTIFF IN ERROR,

vs.

ROSWELL M. RICHARDSON, JOHN LYNCH, AND PELEG BARKER, FRANCIS A. SMITH, ADMINISTRATOR AND TRUSTEE OF THE ESTATE OF DANIEL J. KNIGHT, DECEASED, AND TRUEWORTHY BROWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

**FILED NOVEMBER 1, 1873.**

# SUPREME COURT OF THE UNITED STATES.

## No. 311.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA, PLAINTIFF IN ERROR,

vs.

ROSWELL M. RICHARDSON, JOHN LYNCH, AND PELEG BARKER, FRANCIS A. SMITH, ADMINISTRATOR AND TRUSTEE OF THE ESTATE OF DANIEL J. KNIGHT, DECEASED, AND TRUEWORTHY BROWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Vermont, greeting:

Because in the record and proceedings, and also in the rendition of the judgement of a plea which is in said circuit court before you, between Roswell M. Richardson, John Lynch, Peleg Barker, Francis A. Smith, administrator, with the will annexed, and trustee of the estate of Daniel J. Knight, deceased, and Trueworthy Brown and The Grand Trunk Railway Company of Canada, an alien corporation, a manifest error hath happened, to the great damage of the said Grand Trunk Railway Company of Canada, as by its complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

2 mand you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, 1873, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being duly inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the honorable Nathan Clifford, senior associate justice of the said Supreme Court, the third day of October, in year of our Lord one thousand eight hundred and seventy-three.

B. B. SMALLEY,

3 *Clerk U. S. Circuit Court, District of Vermont.*

Allowed. D. A. SMALLEY, *Judge.*

UNITED STATES OF AMERICA,
*District of Vermont, ss:*

I, Bradley B. Smalley, clerk of the circuit court of the United States of America for the district of Vermont, in the second circuit, by virtue of the above writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 5 to , inclusive, contains a true and compl'te transcript of the record and proceedings had in said court in the case of The Grand Trunk Railway Company of Canada, plaintiff in error, against Roswell M. Richardson, John Lynch, Peleg Barker, Francis A. Smith, administrator, with the will annexed, and trustee of the estate of Daniel J. Knight, deceased, and Trueworthy Brown, defendants in error, as the same remain of record and on file in said cause.

4 In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Burlington, in said Vermont district, in the second circuit, this 3d day of October, A. D. 1873, and of the Independence of the United States the ninety-eighth.

[SEAL.] B. B. SMALLEY, *Clerk.*

Filed October 3d, 1873. B. B. Smalley, clerk.

5 United States circuit court, district of Vermont.

JOHN LYNCH ET ALS.
*vs.*
THE GRAND TRUNK RAILWAY COMPANY OF Canada.

Be it remembered, that at a term of the circuit court of the second

circuit of the United States, begun and holden at Windsor, within and for the Vermont district, on the 22d day of July, A. D. 1873—present, the honorable Ward Hunt, one of the justices of the Supreme Court of the United States, and honorable David A. Smalley, United States district judge within and for the Vermont district—comes The Grand Trunk Railway Company of Canada, by their attorney, George N. Dale, esq., and brings into court now here certified copies from the county court within and for the county of Essex, in the State and district of Vermont, of the petition of said Grand Trunk Railway Company of Canada, to remove said cause to this court, which said petition was in the words and figures following:

6 Essex County court, March term, A. D. 1872.

JOHN LYNCH & CO.
*vs.*
THE GRAND TRUNK RAILWAY CO. OF CANADA.

To the honorable county court, now in session at Guildhall, in and for Essex County, on the second Tuesday of March, A. D. 1872.

Your petitioners, The Grand Trunk Railway Company of Canada, respectfully show that they are the defendants in this suit, and that the same was brought by Roswell M. Richardson, John Lynch, Peleg Barker, of Portland, in the county of Cumberland and State of Maine; Francis A. Smith, administrator and trustee of the estate of Danl. J. Knight, deceased, late of said Portland; and Trueworthy Brown, of Brunswick, in said county of Cumberland and State of Maine, plaintiffs, on or about the 28th day of July, A. D. 1871, in the above-named court,
7 at the term thereof holden on the second Tuesday of September, A. D. 1871, and that the said case was continued from said last-mentioned term to s'd March term for notice to these petitioners, and that the said plaintiffs are, and were at the time of bringing this suit, citizens of the State of Maine, and that your petitioners are, and were at the same time of bringing this suit, aliens; that is to say, subjects of Victoria, Queen of Great Britain and Ireland, and of the Dominion of Canada, a dependency of said kingdom.

And your petitioners further respectfully show that the said plaintiffs claim in the writ in this suit the sum of fifty thousand dollars as damages against your petitioners, and that the matter in dispute in this suit therefore exceeds the sum of five hundred dollars, exclusive of costs.

And these petitioners still further respectfully represent that this suit is brought by the plaintiffs against them, demanding damages in substance as follows:

8 For that the plfs., at the time of committing the grievances complained of, were, and ever since have been, and now are, possessed of certain lands and premises in Brunswick, in said Essex County, on the 7th day of July, A. D. 1870, which said lands are described in the original writ in this case, which is referred to and made a part of this case. Also setting forth that the plfs. were then and there possessed of certain personal property, which is described in said declaration. That on the day aforesaid, and from that day to the day of the date of this writ, the defendants had and maintained the line of their railway across, past, and near by the said lands and premises of the plaintiffs, and past and near by the place where the plfs. were so in possession of said personal property, and ever have been, and are, engaged in

running their locomotive-engines, tenders, and cars over the line of their said railway, and across, past, and near by said lands and premises of the plfs., and past and near by the place where the plfs. were so possessed of said personal property And the defdts., contriving and intend-
9 ing wrongfully and unjustly to injure and aggrieve the plfs. in the possession, use, occupation, and enjoyment of their said lands and premises, with the appurtenances, and of said personal property, and to render the same of little or no value to the plfs., whilst the plfs. were so possessed thereof, on said day first mentioned, and on divers other days and times between said day and the day of the purchase of the said writ, wrongfully and unjustly, and without using due caution and diligence, and without using or employing suitable expedients to prevent such injury, did set fire to and consume, injure, and damage said lands, buildings, and appurtenances described in said declaration; and said personal property described in said declaration as aforesaid, by fire communicated by the locomotive-engines of the defts., so run over their said railway across, past, and near by said lands and premises, and past and near by the place where the plfs. were possessed
10 of said personal property; and by reason thereof said lands and premises and said personal property have been rendered of little or no value or use to the plaintiffs.

And your petitioners still further respectfully represent that this suit has not been tried, but that the same is returnable to said named term of your honor's court; that, owing to local prejudice in the locality where said suit is now pending, *and that* your petitioners desire to remove this suit before the trial thereof into the United States circuit court next to be held at Windsor, in and for the district of Vermont, on the fourth Tuesday of July, A. D. 1872, in pursuance of the provisions of the law as contained in the act of Congress approved July 27th, 1866, entitled "An act for the removal of causes in certain cases from State courts," the act amendatory thereof, approved March 2, 1867, and all laws relating to the premises.

11 And these petitioners are ready and willing to give such good and sufficient surety as the court may direct for their doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States court, and they offer their bond, executed by themselves, as principals, and Geo. A. Bingham, Ossian Ray, and Geo. N. Dale, as sureties, in the penal sum of five thousand dollars, conditioned that your petitioners shall enter in the next circuit court of the United States to be held at Windsor, in and for the district of Vermont, on the fourth Tuesday of July, A. D. 1872, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in this suit, and doing such other appropriate acts as by the said acts of Congress are required to be done upon the removal of a suit into the United States court, as good and sufficient surety, according to the said provisions of law upon the removal of a suit into the United States court.

12 And your petitioners therefore pray that the said bond may be accepted as good and sufficient surety according to law, and that the said suit may be removed into the next circuit court of the United States to be held at Windsor, in and for the district of Vermont, on the fourth Tuesday of July, A. D. 1872, pursuant to the statutes of the United States in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioners will ever pray.

Dated at Brighton, in the county of Essex, on the 12th day of March, A. D. 1872.

T. H. COOPER,
*Agent and Attorney for the Grand Trunk Railway Company of Canada.*

At Guildhall, in Essex County, this 15th day of March, A. D. 1872, then personally appeared Geo. N. Dale, agent and attorney for the Grand Trunk Railway Company of Canada, and made oath that the foregoing petition is true to the best of his knowledge, information, and
13 belief.

Before me.

CHARLES E. BENTON,
*Clerk of Essex County Court.*

ESSEX COUNTY, CLERK'S OFFICE, *July 5, A. D.* 1872.

I hereby certify that the foregoing is a true copy of the original petition on file in this office.

Attest:

[L. S.] CHARLES E. BENTON,
*Clerk of Essex County Court.*

(Indorsed:) John Lynch et als. vs. the Grand Trunk R'y Co. Petition for removal Essex County court, March T., 1872. Essex County court, March term, 1872. Received and filed this 15 day of March, 1872. Attest, Charles E. Benton, clerk. Filed July 23d, 1872. B. B. Smalley, clerk.

14 And at the same time filed a copy of record of judgment, and order of said Essex County court to remove this cause to this court, which said record and order was in the words and figures following:

Essex County court, March term, A. D. 1872.

STATE OF VERMONT,
*Essex County, ss:*

JOHN LYNCH ET ALS.
*vs.*
THE GRAND TRUNK RAILROAD COMPANY OF Canada.

Be it remembered, that at a county court begun and holden at Guildhall, within and for the county of Essex, on the second Tuesday of September, 1871, the Grand Trunk Railway Company of Canada, doing business and having an agent at Brighton, in the county of Essex, are attached to answer unto Roswell M. Richardson, John Lynch, Peleg Barker, of Portland, in the county of Cumberland, and State of Maine; Francis A. Smith, administrator, and trustee of the estate of
15 Daniel J. Knight, deceased, late of said Portland; and Trueworthy Brown, of Brunswick, in the county of Cumberland, and State of Maine, as per writ and declaration appears.

This cause was entered at the September term, 1871.

The plantiffs appeared by Burns & Haywood, their attorneys, and the cause was continued for notice to defendants.

And now at the present term, being the March term, 1872, begun and holden at Guildhall, within and for the county of Essex, on the second Tuesday of March, 1872, the plaintiffs appear by Burns & Haywood and Benj. H. Steele, their attorneys, and the defendants by Geo. N. Dale and Geo. A. Bingham, their attorneys.

Plaintiffs asked leave to, and were allowed to, amend declaration under the rule as to costs.

Defendants filed petition for removal to circuit court of the United States for the district of Vermont.

After a hearing, it was ordered and adjudged by the court that the case be removed to the circuit court, in accordance with prayer of the petition, with the statement and finding of court in regard thereto,

16 the defendants having filed bond in accordance with law.

A true record.

Attest:

CHARLES E. BENTON, *Clerk.*

ESSEX COUNTY, CLERK'S OFFICE, *July 5th*, 1872.

I hereby certify that the foregoing is a true copy from volume 9, page 410, of Essex County court records.

Attest:

[L. S.] CHARLES E. BENTON, *Clerk.*

(Indorsed:) John Lynch et als. vs. the G. T. R'y Co. of Canada. Copy of record of judgment. Filed July 23d, 1872. B. B. Smalley, clerk.

17 And at the same time the said Grand Trunk Railway Company of Canada filed a certified copy from said Essex County court of the original writ against said company, with the officer's return thereon, which said writ and officer's return are in the words and figures following:

STATE OF VERMONT,

*Essex County, ss:*

To any sheriff or constable in the State, greeting:

By the authority of the State of Vermont, you are hereby commanded to attach the goods, chattels, or estate of the Grand Trunk Railway Company of Canada, a corporation doing business and having an agent at Brighton, in the county of Essex aforesaid, to the value of fifty thousand dollars, and them notify thereof according to law; and also notify them to appear before the county court next to be held at Guildhall, within and for the county of Essex, on the second Tuesday of September, A.

D. 1871, then and there in said court to answer unto Roswell M.

18 Richardson, John Lynch, Peleg Barker, of Portland, in the county of Cumberland, and State of Maine; Francis A. Smith, administrator, with the will annexed, and trustee of the estate of Daniel J. Knight, deceased, late of said Portland, and Trueworthy Brown, of Brunswick, in said county of Cumberland, State of Maine, in a plea of trespass on the case, for that the said plfs. before and at the time of the committing of the grievances hereinafter mentioned, were, and from thence hitherto have been, and still are, lawfully possessed of certain lands and premises, with the appurtenances, situated in said county of Essex, to wit, at Brunswick, in said county, on the 7th day of July, 1870, of lot number eight, in the third division of lots in said Brunswick, upon which there was situated a saw-mill and the fixtures thereto belonging, of the value of eighteen thousand dollars; a heading or lumber shed, of the value of one thousand dollars; a blacksmith's shop, of the value of

19 three hundred and fifty dollars; a barn, of the value of six hundred dollars; a boarding-house, of the value of three thousand dollars; a wood-shed, of the value of two hundred dollars; a store, of the value of three hundred and fifty dollars; a wharf at said mill, of the value of two hundred dollars; a wharf at the deft.'s depot, of the value of twenty-five dollars; a bridge for carrying waste from said mill, called a waste-bridge, of the value of two hundred dollars; another bridge upon a private way of the plfs., of the value of seventy-five dollars; an ash-house, of the value of twenty-five dollars, and two hog-houses, of the value of twenty-five dollars.

And the plfs. were, during the time aforesaid, at said Brunswick, also lawfully possessed of certain other lands and premises, with the appurtenances, described as follows: Lots number 11, 12, 17, 19, and 20, in the 3d division of lots in said Brunswick, upon which lots and lot number eight there was situated and standing and growing a great quantity of wood and timber of great value, to wit, of the value of two thousand dollars.

20 And the plfs. during the time aforesaid, at said Brunswick, were also lawfully possessed of the following described personal property: Twenty-five thousand pieces of spruce headings, of the value of five thousand seven hundred and fifty dollars; four hundred thousand feet of spruce boards, of the value of four thousand eight hundred dollars; six thousand feet clear pine boards, of the value of three hundred dollars; thirty thousand pine shingle', of the value of one hundred and five dollars; twenty-five thousand pine lath, of the value of fifty dollars; fifteen cords of oak dowel-timber, of the value of three hundred and fifty dollars; fifty barrels of flour, of the value of three hundred and fifty dollars; one hundred and fifty bushels of corn, of the value of one hundred and eighty-eight dollars; four barrels of pork, of the value of one hundred and thirty-six dollars; two barrels of beef, of the value of fifty dollars; four barrels of beans of the value of forty dollars; four barrels of dried apples, of the value of sixty dollars; one hogshead of molasses, of the value of

21 seventy-five dollars; one barrel of kerosine oil, of the value of fourteen dollars; one-half barrel of machine-oil, of the value of twelve dollars; three store-scales, of the value of thirty-five dollars; ten bushels of potatoes, of the value of five dollars; one hundred pounds of butter, of the value of thirty-five dollars; one single wagon, of the value of fifty dollars; one single sleigh, of the value of twenty-five dollars; one double wagon, of the value of fifty dollars; two buffalo-skins, of the value twenty-five dollars; two horse-blankets, of the value of six dollars; three harnesses, of the value of sixty dollars; two hogs, of the value of twenty-five dollars; five tons of hay, of the value of one hundred and ten dollars; twenty ox-yokes, of the value of sixty dollars; three sets of blocks and rigging, of the value of fifty dollars; one shingle-machine, of the value of one hundred dollars; two box-machines, of the value of two hundred dollars; two heading-machines, of the value of two hundred dollars; one filing-machine, of the value of one hundred and fifty dollars; one gumming-machine, of the

22 value of fifty dollars; one gross dowel-butts, of the value of forty dollars; forty gang-saws and irons, of the value of two hundred dollars; two barrow cars, of the value of fifty dollars; two wheelbarrows, of the value of twenty dollars; one waste-car, of the value of fifty dollars; one cooking-stove and furniture, of the value of seventy-five dollars; four box-stoves and pipe, of the value of fifty dollars; one surveyor's compass and chain, of the value of thirty dollars; bees in

their hives, of the value of one hundred dollars; one piano, of the value of one hundred dollars; one pair of snow-shoes, of the value of four dollars; one pair iron gears, of the value of fifty dollars; belts belonging to said saw-mill, of the value of one thousand dollars; four dozen files, of the value of fifty dollars; the provisions in said boarding-house, of the value of one hundred dollars; the merchandise in said store, of the kinds and descriptions usual' kept for sale in a country store, of the value of one thousand dollars; the tools in said mill,
23 of the value of one hundred dollars; the blacksmith's tools in said blacksmith's shop, of the value of one hundred dollars; the furniture in said boarding-house, of the value of eight hundred dollars; the personal clothing of the plffs., of the value of four hundred dollars; farming tools, of the value of one hundred dollars; camp tools and furniture, of the value of one hundred and fifty dollars; fifty bags, of the value of twenty-five dollars; and of other items of personal property, which the plfs. are unable to enumerate, of the value of three thousand dollars.

And that on the day aforesaid, and from that time to the day of the date of this writ, the defts. had and maintained the line of their railway across, past, and near by the premises of the plfs., and past and near by the place where the plfs. were so in possession of said personal property, and were, have been, and are engaged in running their locomotive engines, tenders, and cars over the line of their said railway, and across, past, and near by said lands and premises of the plfs.,
24 and past and near by the place where the plfs. were so possessed of said personal property; and the defts. contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plfs. in the possession, use, occupation, and enjoyment of their said lands and premises, with the appurtenances, and of said personal property, and to render the same of little or no value to the plfs. whilst the plfs. were so possessed thereof, to wit, at said Brunswick, on the day and year aforesaid, and on divers other days and times between that date and the date of this writ, wrongfully and unjustly, and without employing suitable expedients to prevent such injury, did set fire to and consume, injure, and damage said saw-mill and fixtures, sheds, shop, barn, boarding-house, store, wharves, bridges, ash-house, & hog-houses upon said lot number eight, said personal property in the possession of the plfs. as aforesaid, and said wood and timber situated, standing, and growing upon said lands of the plfs., by fire communicated by the
25 locomotive-engines of the defts. so run over their said railway-line and across, past, and near by said lands and premises of the plfs., and past and near by the place where the plfs. were so possessed of said personal property.

And by reason thereof said land and premises and said personal property have been rendered of little or no use or value to the plfs.

To the damage of the plaintiffs fifty thousand dollars, for the recovery of which, with just costs, this suit is brought.

Fail not, but make service and return according to law.

Dated at Guildhall, in the county of Essex, the 28th day of July, A. D. 1871.

CHARLES E. BENTON, *Clerk.*

H. Heywood & Wm. Burns, S. E. Heywood, recognized to the defendants in the sum of twenty dollars as surety for the costs of prosecution, as the law directs.

Before me.

CHARLES E. BENTON, *Clerk.*

Recognized to each of the above trustees in the sum of fifteen dollars as surety for costs of prosecution, as the law directs.

Before me.

CHARLES E. BENTON, *Clerk.*

26 STATE OF VERMONT, *Essex Co., ss:*

AT BRIGHTON, *this* 31 *day of July*, 1871.

I then served this writ by attaching, as the property of the defendants, village lot No. 74, as represented on Goodwin's plan of I'land Pond Village, in said Brighton, said lot situate 100 feet on South street, 200 feet on Cross street, as represented on said plan, together with the buildings thereon and now occupied by Thomas N. Cooper; the depot grounds in said I'land Pond Village, together with all the buildings thereon, consisting of engine-house, wood-shed, passenger-depot, freight-depot, three dwelling-houses, and out-buildings, shed over scales, oil-house, and one set of Fairbanks' railroad-scales; also the Island Pond House, so called, together with all other out-buildings thereto belonging; also all the real estate belonging to said Island Pond House; also, lots of land in Brighton, formerly called Wenlock, consisting lots Nos. 20 and 21, in the 2d range; Nos. 20 and 21, in the 3d range; Nos. 20
27 and 21, in the fourth range; and lot No. 20, in the 5th range, consisting of 157 acres each. Also, lots Nos. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 54, and 55, in the 2d division of lots in said Brighton, containing 30 acres each. Also, all the' real estate in the said town of Brighton.

And on the same day, at Brighton, I caused to be recorded in the town clerk's office, in Brighton, in a book kept for that purpose, the substantial part of this writ, with this my return thereon at length, and left a like true and attested copy of this writ, together with a like description of the said property so attached by me, with this my return hereon thereon endorsed, in the town clerk's office of the said town of Brighton.

And on the 30th day of August, 1871, I made further service of this writ by attaching one locomotive-engine, No. 134; and on the same day, at Brighton, in said county of Essex, I made service on the defendants, by delivering to John Reeve, a known agent of the
28 defendants, a like true and attested copy of the original writ, together with a like description of the estate and property so attached, attested by me, with this my return hereon thereon endorsed.

Attest: CHESTER W. SCHOFF,
*Deputy Sheriff.*

Officer's fees: 2 copies & returns, 8.00; travel, 35 miles, 3.50; paid town clerk 3.00; securing property, 10.00—24.40.

ESSEX COUNTY, CLERK'S OFFICE,
*July* 5, *A. D.* 1872.

I hereby certify that the foregoing is a true copy of the original writ on file in this office.

[L. S.] Attest: CHARLES E. BENTON,
*Clerk of Essex County Courts.*

(Indorsed:) John Lynch & others vs. The G. T. Railway Co. Essex Co. court. September term, 1871. B. H. Steele, Burns & Heywood, atty'. Filed July 23, 1872. B. B. Smalley, clerk.

29 And at the same time the said Grand Trunk Railway Company of Canada, filed a certified copy from said Essex County, of amendment to plaintiff's declaration, which said amendment was in the words and figures following:

Essex County court, March T., 1872.

JOHN LYNCH ET ALS.
*vs.*
THE GRAND TRUNK RAILWAY CO.

*Amendment to plff.'s declaration.*

The plfs. further aver that at the time the said said mill was destroyed as aforesaid by the defts. the plfs. were the owners of, and in the lawful possession of, one and one-half million feet of spruce and pine timber, of great value, to wit, the sum of fifteen thousand dollars, which timber the plfs. were then engaged in manufacturing in said saw-mill, and by said wrongful acts of the defts. the plfs. were prevented from manufacturing said timber in said mill, and were compelled to sell
30 said timber for a much less sum than its actual value, for the purposes of manufacture in said mill, to wit, for the sum of eight thousand two hundred and fifty dollars, and the plfs., by said wrongful*ly* and negligent acts of the defts. in the destruction of said mill, were damaged in the value of said timber to a great amount, to wit, in the sum of six thousand seven hundred and fifty dollars.

And the plfs. further aver that at the time the said saw-mill was destroyed by the defts. as aforesaid, the plfs. were the owners and in the lawful possession of a certain mill-dam across the Nulhegan River, of the value of two thousand dollars, used by the plfs. in operating said saw-mill. And said mill-dam by said wrongful acts of the defts. in the destruction of said saw-mill as aforesaid, was rendered worthless and of no value.

Whereby the plfs., by said wrongful and negligent acts of the defts., were injured and damaged in the further sum of three thousand dollars.

31 (Indorsed:) Amendment. John Lynch et als. vs. The G. T. R'y Co. of Canada. Essex County court. March term, A. D. 1872. Received and filed this 13th day of March, A. D. 1872. Attest, Charles E. Benton, clerk.

STATE OF VERMONT, *Essex County, ss:*

ESSEX COUNTY, CLERK'S OFFICE,
*July 5th, A. D.* 1872.

I hereby certify that the foregoing is a true copy of the original amendment on file in this office.

[L. S.] Attest: CHARLES E. BENTON,
*Clerk of Essex County Court.*

(Indorsed:) Amendment. John Lynch et als. vs. The G. T. R'y Co. of Canada. Filed July 23d, 1872. B. B. Smalley, clerk.

32 And at the same time the said Grand Trunk Railway Company of Canada filed a certified copy from said Essex County court of the docket-entries in said case, which were in the words and figures following:

Burns & Heywood. 158.

JOHN LYNCH ET ALS.
*vs.*
THE G. T. RAILWAY CO. OF CANADA. } No. 88. N. E.

Continued for notice to defts.

Burns & Heywood. Benj. H. Steele.
Dale. G. A. Bingham.

JOHN LYNCH ET ALS.
*vs.*
THE G. T. R'Y CO. OF CANADA. } No. 59. O. E.

S. T., 1871. Cont'd for notice to defts.
M. T., 1872. Plfs. have leave to amend declaration under the rule as to costs. Amendment to declaration filed March 13, 1872.
Petition and bond filed March 15, 1872. Motion to transfer to circuit court. Case ordered to be removed to the circuit court, in accordance with prayer of the petitioners, with the statement and finding of court in regard thereto, the defts. having filed bond in accordance with law.

33 Essex County clerk's office, July 5, 1872. I hereby certify that the above are true copies from the docket of September term, 1871, and March term, 1872, of Essex County court.
Attest:
[L. S.] CHARLES E. BENTON, *Clerk.*

(Indorsed:) John Lynch et als. vs. The G. T. R'y Co. of Canada. Copy of docket-entries. Filed July 23d, 1873. B. B. Smalley, clerk.

And at the same time the plaintiffs filed in this court their declaration in this cause, which declaration is in the words and figures following:

JOHN LYNCH ET ALS.
*vs.*
THE GRAND TRUNK RAILWAY CO. } In the U. S. circuit ct., district of Vermont, July term, 1872.

34 *Plfs.' declaration.*

The said defts. are summoned to answer to the said plaintiffs in a plea of trespass on the case, for that the said plfs. before and at the time of the committing of the grievances hereinafter mentioned, were, & from thence hitherto have been, and still are, lawfully possessed of certain lands and premises, with the appurtenances, situated in the county of Essex and State of Vermont, to wit, at Brunswick, in said county, on the 7th day of July, 1870, of lot number eight, in the third division of lots in said Brunswick, upon which there was situated a saw-mill and the fixtures thereto belonging, of the value of eighteen thousand dollars; a heading or lumber-shed, of the value of one thousand dollars; a blacksmith-shop, of the value three hundred and fifty dollars; a barn, of the value of six hundred dollars; a boarding-house, of the value of three thousand dollars; a wood-shed, of the value of two hundred dollars; a store, of the value of three hundred and fifty dollars; a wharf at
35 said mill, of the value of two hundred dollars; a wharf at the defts.' depot, of the value of twenty-five dollars; a bridge for carrying waste from said mill, called a waste-bridge, of the value of two

hundred dollars; another bridge upon the private-way of the plfs., of the value of seventy-five dollars; an ash-house, of the value of twenty-five dollars; and two hog-houses, of the value of twenty-five dollars.

And the plaintiffs were during the time aforesaid, at said Brunswick, also lawfully possessed of certain other lands and premises, with the appurtenances, described as follows: Lots numbers 11, 12, 17, 19, & 20, in the 3d division of lots in said Brunswick, upon which lots, and said lot number eight, there was situated and standing and growing a great quantity of wood and timber of great value, to wit, of the value of two thousand dollars.

And the plaintiffs, during the time aforesaid, at said Brunswick, were also lawfully possessed of the following described personal property, to wit: Twenty-five thousand pairs of spruce headings, of the value of five thousand seven hundred and fifty dollars; four hundred thousand feet of spruce boards, of the value of four thousand eight hun-
36 dred dollars; six thousand feet of clear pine boards, of the value of three hundred dollars; thirty thousand pine shingles, of the value of one hundred and five dollars; twenty-five thousand of pine lath, of the value of fifty dollars; fifteen cords of oak dowel timber, of the value of three hundred and fifty dollars; fifty barrels of flour, of the value of three hundred and fifty dollars; one hundred and fifty bushels of corn, of the value *of the value* of one hundred and eighty-eight dollars; four barrels of pork, of the value of one hundred and thirty-six dollars; two barrels of plate-beef, of the value of fifty dollars; four barrels of beans, of the value of forty dollars; four barrels of dried apple', of the value of sixty dollars; one hogshead of molasses, of the value of seventy-five dollars; one barrel of kerosine-oil, of the value of fourteen dollars; one half-barrel of machine-oil, of the value of twelve dollars; three store scales, of the value of thirty-five dollars; ten bushels of potatoes, of the value of five dollars; one hundred pounds of butter, of the value of thirty-five dollars; one single wagon, of the value of fifty dollars; one sin-
gle sleigh, of the value of twenty-five dollars; one double wagon, of
37 the value of fifty dollars; two buffalo skins, of the value of twenty-five dollars; two horse-blankets, of the value of six dollars; three harnesses, of the value of sixty dollars; two hogs, of the value of twenty-five dollars; five tons of hay, of the value of one hundred and ten dollars; twenty ox-yokes, of the value of sixty dollars; three sets of blocks and rigging, of the value of fifty dollars; one shingle-machine, of the value of one hundred dollars; two box-machines, of the value of two hundred dollars; two heading-machines, of the value of two hundred dollars; one filing-machine, of the value of one hundred and fifty dollars; one gum'ing machine, of the value of fifty dollars; one gross dowel butts, of the value of forty dollars; forty gang saws & irons, of the value of two hundred dollars; two barrow-cars, of the value of fifty dollars; two wheel-barrows, of the value of twenty dollars; one waste-car, of the value of fifty dollars; one cooking-stove and furniture, of the value of seventy-five dollars; four box-stoves and pipe, of the value of fifty dollars; one surveyor's compass and chain, of the value of thirty dollars; bees in their hives, of the value of one hundred dollars; one piano, of the value of
38 one hundred dollars; one pair of snow-shoes, of the value of four dollars; one pair iron-gears, of the value of fifty dollars; belts belonging to said saw-mill, of the value of one thousand dollars; four dozen files, of the value of fifty dollars; the provisions in said boarding-house, of the value of one hundred dollars; the merchandise in said store, of the kinds and descriptions usually kept for sale in a country

store, of the value of one thousand dollars; the tools in said mill, of the value of one hundred dollars; the blacksmith's tools in said blacksmith's shop, of the value of one hundred dollars; the furniture in said boarding-house, of the value of eight hundred dollars; the personal clothing of the plaintiffs, of the value of four hundred dollars; farming tools, of the value of one hundred dollars; camp tools and furniture, of the value of one hundred and fifty dollars; fifty bags of the value of twenty-five dollars, and other items of personal property which the plaintiffs are unable to enumerate, of the value of three thousand dollars. And that on the day aforesaid, and from that time to the day of the date
39 of this plaintiffs' writ, the defts. had and maintained the line of their railway across, past, and near by the said lands and premises of the plaintiffs, and past and near by the place where the plaintiffs were so in the possession of said personal property, and were, have been, and are engaged in running their locomotive engines, tenders, and cars over the line of their said railway, and across, past, and near by said lands and premises of the plfs., and past and near by the place where the plfs. were so possessed of said personal property; and the defts. contriving, and wrongfully, and unjustly intending to injure, prejudice, and ag'rieve the plfs. in the possession, use, occupation, & enjoyment of their said lands and premises with the appurtenances, and of said personal property, and to render the same of little or no value to the plfs., whilst the plfs. were so possessed thereof, to wit, at said Brunswick on the day and year aforesaid, and on divers other days and times between that date and the date of the plaintiffs' writ, wrongfully and unjustly, and without using due caution and diligence, and
40 without employing suitable expedients to prevent such injury, did set fire to and consume, injure, and damage said saw-mill and fixtures, shed, shops, barn, boarding-house, store, wharves, bridges, ash-house, & hog-houses upon said lot, number eight; said personal property in the possession of the plaintiffs as aforesaid, and said wood and timber situate, standing, and growing upon said lands of the plfs. by fire communicated by the locomotive-engines of the defts., so run over their said railway line, & across, past, & near by said lands and premises of the plfs., and past and near by the place where the *the* plfs. were so possessed of said personal property, and by reason thereof said land and premises, and said personal property, have been rendered of little or no use or value to the plfs.

And the plaintiffs aver that, at the time the said saw-mill was destroyed as aforesaid by the defts. the plaintiffs were the owners of, and in the lawful possession of one and one-half million feet of spruce and pine timber, of great value, to wit, the sum of fifteen thousand dollars, which lum-
41 ber the plfs. were then engaged in manufacturing in said saw-mill, and by said wrongful acts of the defts. the plfs. were prevented from manufacturing said timber in said mill, and were compelled to sell, and did sell said timber for a much less sum than its actual value, for the purposes of manufacture in said mill, to wit, for the sum of eight thousand two hundred and fifty dollars.

And the plfs., by said wrongful & negligent acts of the defts., in the destruction of said mill, were damaged in the value of said timber, to a great amount, to wit, in the sum of six thousand seven hundred and fifty dollars.

And the plaintiffs further aver that at the time the said saw-mill was destroyed by the defts. as aforesaid, the plfs. were the owners of & in the lawful possession of a certain mill-dam across the Nulhegan River, in said Brunswick, of the value of three thousand dollars, used by the

plfs. in operating said saw-mill. And said mill-dam, by said wrongful acts of the defts., in the destruction of said saw-mill as aforesaid, was rendered worthless and of no value; whereby the plaintiffs, by
42 said wrongful and negligent acts of the defts., were damaged & injured in the further sum of three thousand dollars, all to the damage of the plaintiffs, the sum of fifty thousand dollars.

(Indorsed:) John Lynch et als. vs. The Grand Trunk Railway Co. Plfs. declaration. Filed July 23d, 1872. B. B. Smalley, clerk.

43 And thereupon it was ordered by the court that the said cause be entered on the docket of this court, and it was so entered.

And thereupon said cause was continued until the October term, A. D. 1872, of this court.

And on the 22d day of October, A. D. 1872, the plaintiffs filed a certified copy from said Essex County court, of the plaintiffs' requests in said cause, which said requests were in the words and figures following:

"The plfs. ask that the record show the following:

"Upon the hearing in this court of the petition for the removal of the cause, the plaintiffs insisted and claimed that the petition showed no cause for removal of the case under the statute of 1866, or under the amendment of that statute in 1867, because the suit was not between citizens of the State of Vermont, of the one part, and citizens of some other State or States of the other part, but was and is between
44 citizens of the State of Maine, of the one part, and an alien of the other part."

The plaintiffs also insisted and claimed that there could be no removal under the act of 1789, because the petition was not based upon that statute, and also because the petition for removal was not filed at the time the defendants entered their appearance in the State court. On the last point the facts were as follows: The cause was entered by the plfs. at the Sept. term, 1871, of Essex County court, and continued for notice to defts.

The defts. did not enter at said September term. At the March term, 1872, on the second day of the term, the cause was called up by plfs'. counsel, and inquiry was made whether there was any appearance for defts. Mr. Dale answered that there would be an appearance for the defts., and a motion to remove the cause would be made. The clerk then entered Mr. Dale's name for the defts. upon the docket.

This entry of Mr. Dale's name by the clerk was made without
45 Mr. Dale's knowledge or any direction, except what was said by him as above stated.

Upon the fourth and last day of the term of the court Mr. Dale, as counsel for the defts., filed this petition for removal. The plfs. further insisted that the cause was not subject to removal because the defts. are the lessees operating, under a lease, the railroad of the Atlantic and St. Lawrence Railway Company, a corporation under the laws of Vermont, and the injury complained of in plfs'. declaration arose from an alleged improper and negligent management of said Atlantic and St. Lawrence Railroad.

And that under said lease and the acts of the State of Vermont and statutes pertaining thereto, the said defts. were in the management of said Atlantic and St. Lawrence road; a domestic corporation, and so situated as not to be entitled to the right of an alien in respect to such causes as should arise in the course of their management of said Atlantic and St. Lawrence Railway.

Mr. Richardson to pay defts. a nominal rent for the use of the land plffs. were occupying, in order to prevent the latter from claiming or obtaining right thereto by adverse possession; that plffs. had assented to this request, and at the date of the receipt said station-agent presented a bill of the rent against the plffs., which purported to come from defts.' principal office in Montreal; and thereupon the plff. Richardson paid said rent and took said receipt.

Plffs. never had any writing, except as above stated, authorizing them to erect or maintain said buildings on the land of the corporation or to occupy said land or buildings.

All the foregoing testimony bearing upon the matter of a license was seasonably objected to as incompetent by defts., but
53 the same was admitted subject to exception.

And the court held thereupon that plffs. had given evidence for the jury which would authorize them to find a license to maintain the said buildings and occupy the defts.' land.; to which no exception was taken.

The plffs. claimed to recover under the provisions of the general statutes of Vermont, chapter 28, sections 78 and 79, which are as follows:

"SEC. 78. When any injury is done to a building or other property by fire, communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury."

"SEC. 79. Any railroad corporation shall have an insurable interest in such property, as is mentioned in the preceding section, along its route, and may procure insurance thereon in its own name and behalf."

54 The plffs.' testimony tended to show that the fire originated from one of two locomotive-engines belonging to the defts.; the first hauling a passenger-train westerly, passing the plffs.' mill, about half past one o'clock in the afternoon; and the other, hauling a freight-train easterly, passing the mill about four o'clock the same afternoon. Said mill and other property were situated in the town of Brunswick, Essex County, Vermont, about five miles westerly of North Stratford Station, on the Connecticut River, in New Hampshire, and about twelve miles easterly from the Island Pond Station in Vermont.

The fire was first discovered one-half to three-fourths of an hour after the last-mentioned train went by the mill, burning in or on the westerly end of defts.' railroad-bridge, which was a covered bridge one hundred and ten feet long. Plffs.' witnesses testified in substance that a strong wind was blowing at the time, which carried the fire through the
55 bridge with great rapidity, consuming it entirely, and setting plffs.' saw-mill on fire, the northwesterly corner of which was located within 12 or 15 feet of the southeasterly corner of said bridge, and about the same distance from the main track of defts.' railroad; that it was a very dry time, and, by reason of the wind blowing the fire through and from the bridge, it caught in and upon the saw-mill and consumed it; and was blown and carried from thence to the other buildings and property sued for, consuming the same also.

Plffs. also claimed to recover the value of a large quantity of manufactured lumber, consisting of headings and boards piled upon and near the defts.' roadway, which was burned. The headings were piled in the lumber-shed and on the adjoining platform awainting trasportation. The boards were stuck up in plffs.' mill-yard to dry, for the purpose of

Defts. also renewed their motion for a non-suit, and asked the court to order a non-suit in favor of Roswell M. Richardson, Francis A. Smith, admistrator of Francis A. Smith, and Francis A. Smith, administrators, for the reasons above stated, and to which ruling of the court, in refusing to order a non-suit, defts. excepted.

The court also charged the jury, in substance, that they were themselves and each of us to be governed by the evidence in the case, and that the burden of proof was upon the plffs., in the first instance, to show that the defts., their heirs, executors, and administrators, or some of them, were guilty of negligence in the construction of the bridge, and that the action was communicated to the fire with our seals and dated the 6th day of September, 1873, which was communicated by the defendant's engines to the bridge; and that if the jury found from a fair balance of evidence that the fire was communicated by any of the defts.' engines to the bridge, any company of Canada, a corporation created by the laws of the defts. had established Province of Canada, but doing business in the county of Brighton, in the county of Northumberland, and that the defendants to prevent the fire; and that the plffs. prosecuted a writ of error in due caution and diligence to the latter branch of the Supreme Court to reverse the judgement of the circuit court of the United States, and the same was full and satisfactory.

The jury returned a general verdict for the plffs., and assessed their damages at $ [illegible]. And thereupon the condition of this obligation is such that if the said defts. moved to the Supreme Court of Canada shall prosecute their said writ of error with effect, and on account of the alleged errors in the rulings and exceptions, which motion shall be granted, and shall satisfy and pay all damages and costs, if any, then this obligation shall be void; but if they fail to make their plea good, then the judgment aforesaid shall stand in full force and virtue.

The plan hereto annexed is a correct plan of the bridge, and may be used on the argument of the case.

I certify that the above bond was approved by me. [L. S.]

(Indorsed:) U. S. circuit court. Grand Trunk Railway Co. of Canada vs. Richardson et al. Bond. Allowed. Filed September 6th, 1873.

BRYDGES. [L. S.]
CKSON. [L. S.]
COOPER. [L. S.]
S. W. PIERCE. [L. S.]
BARTLETT. [L. S.]
ND STONE. [L. S.]
N REEVES. [L. S.]
ROBINSON. [L. S.]
CLARK. [L. S.]
ER HINMAN. [L. S.]
S. M. DYER. [L. S.]

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A. SMALLEY, *Judge.*

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Supreme
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Hinman, & Chas. M
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Mr. Richardson to pay defts. a nominal rent for the use of the land plffs. were occupying, in order to prevent the latter from claiming or obtaining right thereto by adverse possession; that plffs. had assented to this request, and at the date of the receipt said station-agent presented a bill of the rent against the plffs., which purported to come from defts.' principal office in Montreal; and thereupon the plff. Richardson paid said rent and took said receipt.

Plffs. never had any writing, except as above stated, authorizing them to erect or maintain said buildings on the land of the corporation or to occupy said land or buildings.

All the foregoing testimony bearing upon the matter of a license was seasonably objected to as incompetent by defts., but
53 the same was admitted subject to exception.

And the court held thereupon that plffs. had given evidence for the jury which would authorize them to find a license to maintain the said buildings and occupy the defts.' land.; to which no exception was taken.

The plffs. claimed to recover under the provisions of the general statutes of Vermont, chapter 28, sections 78 and 79, which are as follows:

"SEC. 78. When any injury is done to a building or other property by fire, communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury."

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54 The plffs.' testimony tended to show that the fire originated from one of two locomotive-engines belonging to the defts.; the first hauling a passenger-train westerly, passing the plffs.' mill, about half past one o'clock in the afternoon; and the other, hauling a freight-train easterly, passing the mill about four o'clock the same afternoon. Said mill and other property were situated in the town of Brunswick, Essex County, Vermont, about five miles westerly of North Stratford Station, on the Connecticut River, in New Hampshire, and about twelve miles easterly from the Island Pond Station in Vermont.

The fire was first discovered one-half to three-fourths of an hour after the last-mentioned train went by the mill, burning in or on the westerly end of defts.' railroad-bridge, which was a covered bridge one hundred and ten feet long. Plffs.' witnesses testified in substance that a strong wind was blowing at the time, which carried the fire through the
55 bridge with great rapidity, consuming it entirely, and setting plffs.' saw-mill on fire, the northwesterly corner of which was located within 12 or 15 feet of the southeasterly corner of said bridge, and about the same distance from the main track of defts.' railroad; that it was a very dry time, and, by reason of the wind blowing the fire through and from the bridge, it caught in and upon the saw-mill and consumed it; and was blown and carried from thence to the other buildings and property sued for, consuming the same also.

Plffs. also claimed to recover the value of a large quantity of manufactured lumber, consisting of headings and boards piled upon and near the defts.' roadway, which was burned. The headings were piled in the lumber-shed and on the adjoining platform awainting trasportation. The boards were stuck up in plffs.' mill-yard to dry, for the purpose of

being manufactured into headings, and extended back from defts.' roadway at the lumber-shed in a southerly direction.

Defts.' reasonably objected to the admission of the testimony
56 bearing upon this point, but the court overruled the objection, and exception was taken.

When the plffs. rested their case, defts. moved that a verdict be rendered in their favor for the following reasons: VI.

(1.) (Because the damages claimed are to' remote.)

(2.) (Because a large part of the property sued for was wrongfully on the defts.' railroad) and (not within the statutes of Vermont referred to;) but the court denied the motion, and the defts. excepted. V. V.

The defts.' evidence tended to show that this fire was not communicated by either of the engines complained of; but, on the contrary, that the plffs. for a long time had maintained a constant fire at the end of their tram-way about 163 feet down stream on the same bank of the river, from where the westerly end of the railroad-bridge rested,
57 for the purpose of burning the edgings, stickings, slabs, and other waste materials from the saw-mill; and that the fire which consumed their bridge and the plffs.' property, run along the bank of the river, or was blown by the wind to the westerly end of the bridge where it was first discovered as aforesaid.

It having appeared that the defts., before and at the time of this fire, had employed one Turcot to watch their bridge on account of the danger of its being burned, and plffs. having claimed on trial that the defts. had not used all due caution and diligence, and had not employed all suitable expedients to prevent the fire, by reason, among other things, of said Turcot (as plffs. contended) not watching the bridge more closely just before the fire; defts. offered to show that it was not the usual practice among railroads in that section of the country to employ a man to watch bridges like the one destroyed; but on plffs. objection the court excluded this testimony, to which the defts. excepted.

58 After the defts. had rested their case, the plffs., in their closing testimony, were allowed to prove, subject to defts.' exception, that at various times during the same summer before this fire took place, some of defts.' locomotives scattered fire when going past the mill and bridge, without showing that either of those which plffs. claimed communicated the fire in question, were among the number, and without showing that said locomotives were similar in their make, state of repair, or management, to those which were claimed to have set the fire-complained of.

Defts.' counsel requested the court to charge that—

(1.) If the jury find that the erection of plffs.' buildings or the storing of plffs.' lumber so near to the defts. railroad track, as the testimony shows, was an imprudent or careless act, and that such a location of this property in any degree contributed to the loss which ensured,
59 then plffs. cannot recover, even though the fire was communicated by defts. locomotive. VII. 1

(2.) That at all events, under the circumstances disclosed in this cause, it was incumbent upon plffs. to use due caution and diligence, and to employ suitable expedients to prevent the communication of fire. VII. 2.

(3.) That the statute upon which the action is predicated does not apply to property located within the limits of the railroad, nor to personal property temporarily on hand. VII (3)

The court refused to give the jury the first and third requests, but gave the second, with the qualification that there was no evidence in the case to which it had any application, to all which the defts. excepted.

Defts. also renewed their motion that a verdict be ordered in their favor for the reasons above set forth, which was again denied by the court, and defts. excepted.

p.16. false VIII.

60 The court also charged the jury that the burden of proof was upon the plffs., in the first instance, to show that the fire in question was communicated from some of the defts.' locomotive-engines to the bridge; and that if the jury were satisfied of that fact by a fair balance of evidence, then plffs. were entitled to recover, unless the defts. had established by a fair balance of evidence that they had used all due caution and diligence, and had employed all suitable expedients to prevent the fire; that the burden of proof was on the defts. as to the latter branch of the case, to which exception was taken.

The charge of the court to the jury upon all matters not excepted to was full and satisfactory, and such as the cause required.

The jury returned a general verdict for the plffs. for $22,312.12 damages, which defts. moved to set aside and that a new trial be granted, on account of the alleged error excepted to in the foregoing bill of exceptions, which motion was overruled, and defts. excepted.

61 The plan hereto annexed is made a part of the case, and may be used on the argument.

I certify that the above bill of exceptions is correct.

WARD HUNT.

(Indorsed:) U. S. circuit court. John Lynch & others vs. Grand Trunk Railway Co. of Canada. Defts.' bill of exceptions. Allowed.

WARD HUNT.

Filed September 6th, 1873. B. B. Smalley, clerk.

62

(Here follows map, marked page 62:)

63 And thereupon at said July term, A. D. 1873, said cause was continued until the October term, A. D. 1873, of this court.

And afterwards, on the 3d day of October, A. D. 1873, and during said October term of this court, judgement for the plffs. was rendered on the verdict.

And on the same 3d day of October, A. D. 1873, a citation was duly issued out of this court, which citation is hereto annexed.

And on the same 3d day of October, A. D. 1873, the defts. presented a bond, in the words and figures following:

Supreme Court of the United States.

Know all men by these presents that we, C. J. Brydges & J. Hickson, as principals, and T. H. Cooper, Chas. W. Pierce, J. M. Bartlett, Diamond Stone, John Reeves, E. C. Robinson, G. E. Clark, Porter
64 Hinman, & Chas. M. Dyer, as sureties, are held and firmly bound unto John Lynch, Roswell M. Richardson, Peleg Barker, all of Portland, Cumberland County, Maine; Trueworthy Brown, of Brunswick, in said county & State, and Francis A. Smith, of said Portland, administrator, with the will annexed, & trustee of the estate of Daniel J. Knight, late of said Portland, deceased, in the sum of thirty thousand

dollars, to be paid to the said John Lynch, Roswell M. Richardson, Peleg Barker, Trueworthy Brown, and Francis A. Smith, admistrator and trustee as aforesaid, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated the twenty-ninth day of July, A. D. 1873.

Whereas, the Grand Trunk Railway Company of Canada, a corporation established by a law of the Dominion of Canada, but doing
65 and transacting business at a place called Brighton, in the county of Essex and State of Vermont, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgement rendered in the above-entitled suit by the circuit court of the United States for the district of Vermont.

Now, therefore, the condition of this obligation is such that if the above-named Grand Trunk Railway Company of Canada shall prosecute their said writ of error to effect, and answer all damages and costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. J. BRYDGES. [L. S.]
J. HICKSON. [L. S.]
T. H. COOPER. [L. S.]
CHAS. W. PIERCE. [L. S.]
J. M. BARTLETT. [L. S.]
DIMOND STONE. [L. S.]
JOHN REEVES. [L. S.]
E. C. ROBINSON. [L. S.]
G. E. CLARK. [L. S.]
PORTER HINMAN. [L. S.]
CHAS. M. DYER. [L. S.]

Sealed and delivered in presence of—
W. WAINWRIGHT.
R. WRIGHT.
W. A. LITTLE.
OSSIAN RAY.

66 The above bond is approved.

D. A. SMALLEY, *Judge.*

And the same was duly approved, and was ordered to be filed, and was filed.

And on the 3d day of October, A. D. 1873, the defendant prayed out a writ of error to the Supreme Court of the United States, and the same was duly allowed and filed on the same day.

And on the same 3d day of October, A. D. 1873, the defendant filed in this court, for the use of the plaintiffs in this cause, a true copy of the writ of error and citation hereinbefore referred to.

And on the same 3d day of October, A. D. 1873, the citation hereinbefore referred to was duly returned to this court with service duly accepted, as will appear from the citation hereto annexed.

67 UNITED STATES OF AMERICA, *ss:*

To Roswell M. Richardson, John Lynch, & Peleg Barker, of Portland, in the county of Cumberland, in the State of Maine, Francis A. Smith,

administrator, with the will annexed, and trustee of the estate of Daniel J. Knight, deceased, late of said Portland, and Trueworthy Brown, of Brunswick, in said county of Cumberland, & State of Maine, greeting:

You and each of you are hereby cited to be and appear at a Supreme Court of the United States, holden at Washington on the second Monday of October, A. D. 1873, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Vermont, wherein The Grand Trunk Railway Company of Canada, a corporation organized & doing business under the laws of Canada, and having its residence & place of business at Montreal, in the
68 Dominion of Canada, is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgement in the said writ of error complained of, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, this 3d day of October, A. D. 1873.

WARD HUNT,
*One of the Justices of the Supreme Court of the United States.*

We hereby accept service of the foregoing process, and agree that this acceptance of service shall be as effectual as legal service.
October 3d, 1873.

ROSWEL M. RICHARDSON.
JOHN LYNCH.
PELEG BARKER.
FRANCIS A. SMITH.
TRUEWORTHY BROWN,
By HENRY HEYWOOD,
*Their Attorney.*

69 (Indorsed:) Returned. Service accepted October 3, 1873.
B. B. SMALLEY, *Clerk.*

(Indorsement on cover:) No. 311. The Grand Trunk Railway Company of Canada, plaintiff in error, vs. Roswell M. Richardson, John Lynch, & Peleg Barker, Francis A. Smith, admr. and trustee of the estate of Daniel J. Knight, dec'd, and Trueworthy Brown, Vermont. C. C. U. S. Filed 1st November, 1873.

# SUPREME COURT

OF THE

# UNITED STATES.

## NO 91.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA, PLAINTIFFS IN ERROR,

VS.

ROSWELL M. RICHARDSON, AND OTHERS, DEFENDANTS IN ERROR.

*In Error to the Circuit Court for the District of Vermont.*

BRIEF FOR THE PLAINTIFFS IN ERROR, BY

**Geo. N. Dale, Geo. A. Bingham, Ossian Ray,**

COUNSEL.

Coos Co. REPUBLICAN Steam Power Print.

municated from a locomotive engine of the plaintiffs in error July 7, 1870. Original writ dated July 28, 1871, (Record, folio 25) returnable at Essex County (Vermont) Court, September Term, 1871, (Record, folio 15) and continued to the March Term of said Court, 1872, when upon the petition of the plaintiffs in error, said cause was removed into the United States Circuit Court for the District of Vermont, and was continued from term to term until the July Term, 1873, when the same was tried upon the plea of the general issue before the Hon. Ward Hunt and Hon. D. A. Smalley JJ., and a jury. After hearing the evidence, arguments, and charge of the court, the jury rendered a verdict in favor of the defendants in error for $22,312.12. (Record, folio 48.) The plaintiffs in error excepted to various rulings of the court in admitting and rejecting testimony, to the refusal of the court to order a verdict in their favor, to the refusal of the court to charge as requested by them, and to the instructions given to the jury, as appears in the bill of exceptions allowed in said cause. (Record, folios 50 to 63.) The action was then continued to the next October Term of said Court, when judgment was rendered upon the verdict.

## POINTS.

### I.

The receipt for one dollar, to pay land rent for the year ending October 31st, 1870, dated October 27th, 1870, given in evidence by defendants in error, subject to exception, (Record, folios 51 and 53) was incompetent.

1. Because it was given nearly four months after the fire. The relations, rights and liabilities of the parties at the time of the fire to wit, July 7th, 1870, could not and ought not to be varied or changed afterwards by this transaction.

2. The dollar was paid and the receipt given, not to show the payment of a consideration for a previous license or right to occupy, nor for the purpose of creating a tenancy, but merely to show a surrender on the part of the defendants in error of any right they had gained by adverse possession. (Record, folio 52.) Hence the evidence was incompetent for the purpose for which it was held admissible.

3. Presumably the engineer had no authority to lease any part of the company's roadway, or to license anybody to occupy it. His duty and authority were to protect the same from intruders and adverse occupants.

4. The receipt was not made competent by the conversation between Richardson, one of the defendants in error, and the engineer, because this conversation apparently occurred after the fire, and shortly afore the receipt was given. (Record, folio 52.)

## II.

The Court erred in excluding the testimony offered by the plaintiffs in error, to show that it was not the usual practice among railroads in that section of the country to employ a man to watch bridges like the one destroyed, (Record, folio 57,) especially as the defendants in error contended that the company was liable

because Turcot had not watched the bridge more closely just before the fire.

1. It was clearly competent as rebutting evidence.

In reply to the claim that the company omitted to watch the bridge at a particular time, in a particular manner, they had the right to show that they were not bound to watch it in that manner at all. The presumption is, that railroad companies as a rule, like individuals, exercise common care and prudence in watching their property and preserving it from destruction. It is manifestly for their interest to do so. The contrary is the exception and not the rule. The plaintiffs in error were bound to exercise such caution and diligence, and to employ such expedients in preventing a fire, as prudent men ordinarily do in taking care of their own property.

The evidence rejected certainly tended to show that they took such care in this case. It also tended to show that the employment of Turcot to watch the bridge was an act of extraordinary and unusual care and diligence, and that whatever Turcot omitted to do, at the time complained of, was merely a neglect to exercise extraordinary care—not a neglect or want of ordinary care and prudence.

The greater includes the lesser. Proof of neglect to take extraordinary care is not proof of neglect of ordinary care.

This evidence tended to show that defendants in error were exacting from the corporation a greater degree of care than railroads usually exercise, or are bound to exercise, under like circumstances.

## III.

There was error in admitting the testimony introduced by the defendants in error, that some of the company's locomotives scattered fire at various times during the same summer before the fire, when passing the saw mill, without showing that either of the two which the defendents in error claimed to have communicated the fire in question, was among the number; and also without showing that either was similar in construction, state of repair, or management to those which scattered fire as aforesaid. (Record, folios 54 and 58.)

There is and must be a great variety of locomotives in constant use upon the Grand Trunk Railway, as well as upon all other important lines of railway in this country. They have to be run by different engineers, are of different make or construction, and are liable to be in different conditions of repair and efficiency. Engines are necessarily required to work a much greater amount of steam in hauling heavy trains, or in going up heavy grades, than under other circumstances, and they are more likely to scatter fire at such times than when doing lighter work.

Considering the dryness of the season, it is improbable that the passenger locomotive, which went by this mill *three hours and more before* any fire was discovered, (Record, folio 54) set the fire, or was the cause of it. The only evidence tending to show that the freight engine, which passed the mill half or three-fourths of an hour before the fire was discovered, probably set it, was the occurence of the fire itself.

The case is utterly destitute of any other fact or circumstance, which has the remotest tendency to show that the fire was communicated from any locomotive, unless the testimony above alluded to, affords it.

This fire was set by one of these two locomotives, if set by any. and the fact that sparks were emitted at other times from

other engines, had no legal tendency to prove that the two complained of, or either of them, emitted sparks or coals when passing the premises of the defendents in error that afternoon.

Suppose that out of a hundred or more locomotives, passing the mill and bridge during the summer of 1870, and before the fire, "some of them" (Record, folio 58)—a very indefinite number to say the least—did scatter fire, what possible tendency could this have to show that the two in question were among them, or to show that either of them set this fire? There was no testimony showing that either of these two locomotives was out of repair on the day of the fire, or that they had ever scattered fire before.

1. In order to have rendered the testimony admissible it should have been confined to the same engines, operated in the same manner, and in the same state of repair, or to other engines *proved* to have been of the same construction, used in the same manner, and in the same state of repair.

Boyce *v.* Cheshire R. R., 42 N. H. R. 97
Phelps *v.* Conant 30 Vt. R. 277, 284.
Malton *v.* Nesbit, 1 Car. & Payne R. 70.
Hubbard *v.* Railroad Co., 39 Me. R. 506.
Standish *v.* Washburn, 21 Pick. R. 237.
Collins *v.* Dorchester, 6 Cush. R. 396.
Robinson *v.* Railroad Co., 7 Gray R. 92, 95.
Jordan *v.* Osgood, 109 Mass. R. 457.

The effect of such evidence before the jury could not be otherwise than highly prejudicial to the plaintiffs in error.

Sheldon *v.* Railroad Co., 29 Barb. R. 226.
Smith *v.* Railroad Co., 37 Missouri R. 287.
Railroad Co. *v.* Doak, 52 Penn. (State) R. 379.

2. The court gave to this testimony the full force and effect of evidence in chief, while, as a rule, in the few jurisdictions where such

proof has been admitted at all, it has been received only as rebutting evidence.

Cleavelands *vs.* G. T. R. Co., 42 Vt. R. 449.
Ross *v.* Railroad Co., 6 Allen R. 87.

We are aware of two cases in New York which form an exception to the rule.

Sheldon *vs.* Hudson R. R. Co., 14 N. Y. R. 219.
Field *vs.* N. Y. Central R. R. Co., 32 N. Y. R. 339.

Plaintiffs in error put in no proof, on the trial of this case, which made such testimony competent by way of reply or rebuttal. In Cleavelands case, *ubi supra*, and other cases generally, where evidence of this character has been received, it was shown in the first instance that engines of proper construction and in suitable repair would not scatter fire so as to endanger property, and where the damage sued for could not be attributed to a particular engine; or to show by way of contradiction, that the company's locomotives were not of proper construction, or in a suitable state of repair when scattering fire in that way.

## IV.

The motion of the plaintiffs in error, that a verdict be ordered in their favor because a large part of the property sued for was wrongfully on their railway, ought to have been granted. (Record, folio 56.) It was *conceded* that the saw mill, wood or lumber shed, and store, stood *partly* on the company's land. (Record, folio 50.)

A large portion of the manufactured lumber was also piled on the company's land. (Record, folio 55.)

The plan shows that the *entire* store and *nearly all* the wood or lumber shed, stood within the limits of the roadway. (Record, folio 62.)

The evidence bearing upon this subject was all seasonably objected to. (Record, folios 53 and 56.)

1. Railways are public corporations, charged with the performances of certain public duties and obligations. In order to perform those duties and obligations, the law-making power, under the right of eminent domain, has enabled them to take a limited quantity of land and hold the same for the uses and purposes of their organization. Such corporations have no power to part with their franchises, or any portion thereof, by license, lease, mortgage or other conveyance, without the consent of the Legislature.

Nor can they part with or abandon the control and occupancy of their roadway, in the manner and to the extent claimed here by the defendants in error, without such consent.

The occupation of a large portion of the six rods, (Record, folio 50.) laid out for the roadway, with permanent buildings—such as saw mills, country stores, lumber store-houses, tramways to remove mill-waste, and the like,—for private purposes, whether with or without the assent of the corporation, necessarily incumbers its roadway, impairs the structure of its track, endangers the running of its trains, increases the risks and dangers

of railway transportation, lessens the safety and comfort of passengers, and generally hinders, impedes and embarrasses the company in the performance of its duties and obligations to the public. An intrusion of this character is and ought to be held contrary to public policy. Any license of the corporation for, or acquiescence in, such a permanent user within their chartered limits, ought to be held void, because contrary to sound public policy.

Such an intruder should be treated as a wrongdoer, or trespasser, at least until his occupancy has ripened into a prescriptive right.

See the remarks of Pierpoint, C. J., in Troy & Boston R. R. Co. *vs.* Potter, 42 Vt. R. 265, 275–6.

Jackson *v.* Rutland & Burlington R. R. Co., 25 Vt. R. 150–159.

Hurd *v.* Rutland & Burlington R. R. Co., 25 Vt. R. 116 and 121.

Richards *v.* R. R. Co., 44 N. H. R. 127, 135.

2. The receipt of October 27th, 1870, before alluded to, was given in evidence by defendants in error, to show the payment of a yearly rent for the use of the land which they had occupied.

If this was competent evidence to prove a right on their part to occupy the land at all, it proves a lease or tenancy from year to year, and six months' notice to quit, looking to the end of the year, would be necessary to terminate the lease, according to the law of Vermont.

Silsby *v.* Allen, 43 Vt. R. 172.

Barlow *v.* Wainwright, 22 Vt. R. 88.

Hall *v.* Wadsworth, 28 Vt. R. 410.

4 Kent Com. (Star paging) 111–116.

3. Aside from the receipt, given after the fire, the testimony on this subject all tended to show an adverse occupancy instead of a tenancy.

At the time of the fire, so far as the case shows, the relations of the parties were such, that the corporation might have maintained an action of trespass on the freehold, against the defendants in error.

Troy & Boston R. R. Co. *v.* Potter, before cited.

If the evidence was incompetent, the conclusion follows, that the property of the defendants in error was wrongfully upon the roadway, and the plaintiffs in error cannot be made liable for its loss, except on proof of gross negligence, and according to the principles of common law,

Jackson *v.* Rutland & Burlington R. R. Co., and Hurd *v.* the same, before cited.

Bemis *v.* C. & P. R. R. R. Co., 42 Vt. R. 375.

Railroad Co., *v.* Anderson 20 Mich. R. 244.

It is apparent from the plan and record, (folio 55) that the property of the defendants in error, situated outside the roadway limits, was destroyed solely by reason of the burning of that portion of their property within the roadway limits. The destruction

of the former, was necessarily occasioned by the burning of the latter.

The wrongful act of the defendants in error, in placing the latter where it was at the time of the fire, was the cause of the destruction of the whole. Therefore the motion for a verdict in our favor ought to have been sustained.

## V.

Another reason why a verdict should have been ordered in our favor is, that the statute of Vermont, upon which the defendants in error claimed and were allowed to recover, (Record, folios 53, 56, 59 and 60,) has no application to property injured or destroyed *within* the limits of the roadway, *even if it is rightfully there.*

1. Where property thus situated is destroyed by fire, it is incumbent upon the plaintiff to establish not only the fact that the fire was communicated by the defendants locomotives, but also that it was carelessly and negligently communicated.

No evidence of negligence on the part of the corporation was introduced on the trial—the court holding that the defendants in error might recover without such proof, upon showing the mere

fact that the fire was probably communicated to the bridge, by some of the company's locomotives.

2. Sections 78 and 79 of Chapter 28 of the General Statutes of Vermont, before cited, should be construed together. Section 79 authorizes the corporation to obtain insurance upon such property only, as they may be held liable to pay for, under Section 78.

No fair construction of these provisions gives the corporation any right to insure property wrongfully upon its premises. Such was not the intent of the legislature.

**Chapman** *v.* **Railroad Co. 37 Maine R. 92.**

3. It is plain, we think, that these sections refer to property situated alongside, adjoining, and near to the route of the railway, and not to property upon or within the route. The phrase "along its route," in section 79, clearly means by the side of, alongside, along the line of, lengthwise of, adjoining, or near to, the chartered limits of the company's roadway, as surveyed and located.

*Route*, means a course, way, or path, which is traveled, or passed over.

This phrase cannot justly be held to mean within, upon, over, or across the route.

Bailey *v.* White, 41 N. H. R. 337.

Peaslee *v.* Gee, 19 N. H. R. 273.

The difficulty with this case is, that the injury alleged does not appear to be within the mischief against which the statute is aimed. The legislature, by these provisions did not intend to meddle or interfere with, the common law duties, rights or liabilities of the respective parties, growing out of the use or occupation of the roadway. It was not within the contemplation of the legislature, when these sections were enacted, that the adjoining land-owners, would occupy any part of the company's six rods. That space it was supposed would be occupied exclusively by the corporation. The statute was framed and intended to aid the adjoining land-owner, in case his property—located on his own premises, *not upon the railway*—should be injured by fire communicated from a locomotive, by casting the burden of proof on the corporation to show the exercise of due care and suitable expedients to prevent it.

Metallic Co. *v.* Railroad Co., 109 Mass. R. 277.
Gorris *v.* Scott 9 Exch. Law Rep. 125.
Atkinson *v.* Waterworks Co., 6 Exch. Law Rep. 404.
Hall *v.* Brown, 54 N. H. R. 495.

4. If the construction contended for by the defendants in error, and allowed by the court, is the true construction of this statute, it is remarkable that no case or authority can be cited in support of it, while the decisions in those jurisdictions where similar statutes exist, are numerous to the effect, that without affirmative proof of negligence, railways are not liable for the loss by fire of property held by them as warehousemen, or as depositaries, within the limits of their roadway, when destroyed.

Barron *v.* Eldridge 100 Mass. R. 455. See cases everywhere.

5. The fact. that in this respect the cause is without a precedent, also furnishes strong ground for holding that the statute does not apply.

## VI.

A verdict should have been ordered for the plaintiffs in error, because the damages claimed are too remote. (Record, folios 54, 55 and 56.)

The testimony of the defendants in error tended to show that only two locomotives passed the saw-mill that afternoon before fire; that the first one passed about one o'clock and thirty minutes; the other about four o'clock; that the fire was first discovered half or three-fourths of an hour later, burning at the westerly end of the railway bridge; that a strong wind was then blowing, which carried the fire through the bridge with great rapidity, consuming it entirely, and by reason of the wind blowing the fire from the bridge it caught in and upon the saw-mill, located within twelve or fifteen feet of the bridge, and consumed that also; that the fire was blown and carried from the saw-mill to the other buildings and property sued for, and they too were consumed.

See the opinion of Hunt, J., in Ryan *v.* N. Y. Central R. R., 35 N. Y. R. 210.

Penn. R. R. *v.* Kerr, 62 Penn. (State) R. 353, is another well considered authority.

Hookset *v.* Concord R. R. 38 N. H. R. 242–6.

Harrison *v.* Berkley, 1 Strobhart (S. C.) R. 548.

Morrison *v.* Davis, 20 Penn. (State) R. 171.

Insurance Co. *v.* Tweed, 7 Wallace R. 44, 52.

3 Parsons on Contracts p. 198.

Lord Bacon says: "It were infinite for the law to judge the causes of causes and their impulsion one upon another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."

1. The loss of the boarding-house and contents was not the natural, proximate and direct result or consequence of the burning of the bridge or saw-mill. The boarding-house was about twenty and one-half rods (337 1-2 feet) distant from the bridge, and about seventeen and one-half rods (287 1-2 feet) distant from the mill.

The store and contents were still further off. (525 feet, or nearly 32 rods.) See plan.

Ordinarily both store and boarding-house would have escaped destruction, though the bridge and mill were burned.

2. Whether the damages claimed were too remote, or otherwise, was at least a question for the jury.

Holden *v.* Railroad Co. 30 Vt. R. 297, 303–4.

Saxton *v.* Bacon 31 Vt. R. 540, 546–7.

Toledo &c. R. R. Co. *v.* Pindar, 53 Ill. R. 447.

Fant *v.* Toledo &c. R. R. Co., 59 Ill. R. 351.

Fairbanks *v.* Kerr, 70 Penn. (State) R. 86.

Kellogg *v.* Milwaukee & St. Paul R. R. Co., tried before Miller and Dillon, JJ., in May 1874, and reported in Wharton on Negligence, Sec. 154, is a strong authority in our favor.

Whether the burning of *any* of the property sued for—especially the boarding house, and store, and their contents—was a result naturally and reasonably to be expected from the firing of the bridge, or not, should have been submitted to the jury. *Vide* the instructions of his Honor Judge Miller to the jury in Kellogg *v.* Railroad Co., before cited.

Saunders on Negligence, Chap. VII, pp. 224—339.

But the presiding judge in our case, charged in substance, that if the fire complained of was communicated from a locomotive to the bridge, the defendants in error had made out their case to all intents and purposes. (Record, folio 60 and 59.)

## VII.

*The charge to the jury.*

1. Our first request, or the substance of it, ought to have been given. It was as follows:

"If the jury find that the erection of plaintiffs buildings or the storing of plaintiffs lumber so near to the defendants railroad track as the testimony shows, was an imprudent or careless act, and that such a location of this property in any degree contributed to the loss which ensued, then plaintiffs cannot recover even

though the fire was communicated by defendants locomotives." (Record, folio 58.)

The evidence tended to show contributory negligence upon the part of the defendants in error. They had encroached largely upon the company's land by erecting several wooden buildings close to the track. It was a very dry time. Knowing that the corporation was obliged to run several locomotives daily each way by their mill, the defendants in error had piled upon and near the roadway a large quantity of headings, boards, and other dry and combustible material, which extended all along the platform between the mill and shed, and back into the mill-yard. (Record, folio 55.)

The question whether there has been contributory negligence in a given case, or not, is almost always a matter of fact to be settled by the jury upon an intelligent consideration of all the circumstances.

Kelsey *v.* Glover, 15 Vt. R. 708, 714—716.

Allen *v.* Hancock, 16 Vt. R. 230.

Cassedy *v.* Stockbridge, 21 Vt. R. 391, where the instructions to the jury were, that if the plaintiff's want of ordinary care had contributed in any, the slightest degree, to produce the injury complained of, he was not entitled to recover. *Held* correct. *Ibid.* 395, 398.

Robinson *v.* Cone, 22 Vt. R. 213, 225.

Sessions *v.* Newport, 23 Vt. R. 9.

Barber *v* Essex, 27 Vt. R. 62.

Briggs *v.* Taylor, 28 Vt. R. 183.

Swift *v.* Newbury, 36 Vt. R, 355, 358–9.

Hill *v.* New Haven, 37 Vt. R. 501.
Vinton *v.* Schwab, 32 Vt. R. 612.
Folsom *v.* Underhill, 36 Vt. R. 580, 591–2.
Hodge *v.* Bennington, 43 Vt. R. 450.
Willard *v.* Pinard, 44 Vt. R. 34.
McCully *v.* Clark, 40 Penn. (State) R. 399.
Hackford *v.* Railroad, Co., 53 N. Y. R. 654.
Gonzales *v.* Railroad Co., 38 N. Y. R. 440.
Munger *v.* Railroad Co., 4 N. Y. R. 349.
Railroad Co. *v.* Van Steinburg, 17 Mich. R. 99.
Railroad Co. *v.* Mills, 42 Ill. R. 407.
Railroad Co. *v.* Frazier, 47 Ill. R. 505.
Railroad Co. *v.* Shanefelt, 47 Ill. R. 497.
Railroad Co. *v.* Terry, 8 Ohio (State) R. 570.
Webb *v.* Railroad Co., 57 Me. R. 117.
Bigelow's Leading Cases on Torts, 589, 596.
Wharton on Negligence Chap. XI, Sec. 420—427.

If there was *any* evidence tending to prove contributory negligence we were entitled to have it submitted to the jury.

Page *v.* Parker, 43 N. H. R. 363.

In Sioux City & P. R. R. Co. *v.* Stout, 17 Wallace R. 637, Hunt, J., forcibly says: "Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may presume to be clearly established from which one sensible, impartial man would infer that negligence existed; another man

equally sensible and equally impartial would infer that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, these sit together, consult, apply their separate experience of the affairs of life to the facts found, and draw an unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge. * * * We find, though not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they established negligence."

To the same effect is the case of Vinton *v.* Schwab, 32 Vt. R. 612; and Wakefield *v.* C. & P. R. R. R. Co., 37 Vt. R. 330.

Shearman & Redfield on Negligence, Chapter III, Sections 25 to 34.

Plaintiffs' fault must *proximately* contribute to his injury in order to constitute a ground of defense; but it is not necessary that it should *directly* contribute to such injury. "Proximate" does not mean next, or near in the order of time, but near in the order of causation. Thus where a trespasser enters an enclosure some time may elapse before he is injured, yet if the injury was in part the consequence of his being on the premises, his wrongful

entry may be properly described as a proximate cause of the injury. *Ib.*, Sec. 33, Chicago &c., R. R. Co. *v.* Goss, 17 Wisconsin R. 428. The same doctrine applies to a licensee.

Suppose the defendants in error had stored gunpowder along and upon the roadway at the time aforesaid, and it had been destroyed by fire, ought not the question whether such conduct was careless, and contributed to the loss of the gun-powder, or otherwise, to be submitted to the jury?

The court, by denying this request, practically decided against the plaintiffs in error, a question of fact which was in dispute.

In some States the rule is, that where the court can see that the plaintiff has been guilty of a plain act of carelessness, which contributed to the accident, it is the duty of the court as a matter of law to order a verdict in favor of the defendant.

Lewis *v.* Baltimore & Ohio R. R. Co., American Law Register, New Series, Vol. 13, p. 284, May, 1874. We also call attention to the valuable notes of Mr. Francis Rawle, appended to that case, upon this same subject, in which nearly all the cases bearing on this point in America and England, are cited and considered.

Mr. Rawle's summary of the decisions in both countries shows, that in most cases the matter of negligence is to be submitted to the jury, upon the question of reasonable care, under all the circumstances of the case. He doubts the policy of withdrawing cases from the province of the jury even where gross acts of carelessness have been shown, as in Maryland and some of the other States; and says: "If the measure of duty is simply a proper regard for one's own safety, or one's own property, there can be no standard but ordinary care. The best tribunal to decide that question, whether the facts are disputed or not, is the jury." *Ibid.* p. 300.

2. Our second request to charge, viz. "That at all events, under the circumstances disclosed in this cause, it was incumbent upon the plaintiffs to use due caution and diligence, and to employ suitable expedients to prevent the communication of fire," ought to have been given to the jury, without the qualification added by the presiding Judge, "that there was no evidence in the case to which it had any application." (Record, folio 59.)

The court conceded the correctness of the principle contained in the request, but practically denied us the benefit of it before the jury. It involves the doctrine of contributory negligence and is a matter for the jury, and the authorities cited in support of our first request to charge, are equally applicable in support of this request.

In Railroad Co. *v.* McElwee 67 Penn. (State) R. 315, Williams, J. remarks: "The law is well settled that what is and what is not negligence in a particular case is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care. In such case the measure of duty is not fixed, but variable. Under some circumstances a higher degree of care is demanded than under others, and when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law, and must be submitted to the jury to determine what it is, and whether it has been complied with."

Either with or without a license, the defendants in error had occupied a considerable portion of our roadway a long time, with

in an exposed position, or *put it up in an imprudent manner*, if he placed it where he had a lawful right to place it' &c., he may recover if it was destroyed by the negligence of the defendants. Could he recover if it was negligence to thus place his property and leave it without any protection, and the absence of such protection contributed to its loss? Surely not; for where both parties have been guilty of negligence contributing to the loss, neither can recover. The instruction, then, is fatally defective, in that it does not submit to the jury the question whether the plaintiff, by his negligence, contributed to the loss; and, if so, then he could not recover. And it is not only defective in this, but is affirmatively erroneous in that it says to the jury that the plaintiff may recover, although 'he placed his property in an exposed position, and put it up in an *imprudent manner*.' What is an imprudent act? It is no more or less than a heedless, rash, careless, negligent act. So that in fact the jury were told that the plaintiff could recover for his hay, although he was guilty of negligence in the manner of putting it up."

The court will observe that there is a wide difference between the facts here, where the combustible matter was deposited on the company's land by the defendants, in error themselves, and in Webb *v.* Rome &c. R. R. Co., 49 N. Y. R. 420 and analogous cases, where it was so deposited and allowed to remain by the corporation.

If the defendants in error are entitled to stand in the position of licensees, or of persons going upon the railroad premises to

transact business, as upon invitation, then each party is bound to use ordinary care in respect to the other, and the question of contributory negligence is for the jury.

Saunders on Negligence, 71, 72 & 73.
Balch *v.* Smith 7 Hurlst. & Norm. 741.
Scott *v.* London Docks Co., 11 Law Times (N. S.) 383.
Hounsel *v.* Smith 7 C. B. (N. S.) 738.
Barnes *v.* Wood 9 C. B. 392.
Eagan *v.* Railroad Co., 101 Mass. R. 315
Shaw *v.* Railroad Co., 8 Gray R. 45.
Bailey *v.* Railroad Co., 107 Mass. R. 496.

We contend, however, that the defendants in error, at best, occupied the company's land merely as licensees, and the authorities go to show that a mere passive acquiescence on the part of the owner, or occupier, in the use of real property by others, does not involve him in any liability to them for its unfitness for such use. They take all such risks upon themselves, and have no right to complain of any defects in the premises, even though caused by the direct acts of the owner—as for pits dug in the land, or for running engines within the chartered limits of a railway—unless the acts are grossly negligent, or malicious.

Wharton on Negligence, Sec. 831.
Murray *v.* McLean, 57 Ill. R. 378.
Sweeney *v.* Railroad Co., 10 Allen R. 368.

In the last case Bigelow C. J. says: "The owner of land is not bound to protect or provide safeguards for wrongdoers. So a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner, or occupant, cannot recover damages for injuries caus-

ed by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant, to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter, or induced to come upon them, by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place, for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon."

Nicholson *v.* Railroad Co., 41 N. Y. R. 525, 530.
Kenney *v.* Railroad Co., 34 N. J. R. 513.
Zoebisch *v.* Tarbell, 10 Allen R. 385.
Chapman *v.* Rothwell, Ellis, Bl. & Ellis, R. 668.

There are several recent and well considered authorities, in actions against railway companies, where it has been decided that the plaintiff *must affirmatively show* that he was guilty of no negligence. These rest on the ground that the cars and engines of the road, must run upon a fixed and permanent track which cannot be deviated from, and because of the dangerous and uncontrollable power by which they are operated, holding that one who has placed himself or his property within their power and influence, might properly be called upon to explain by his evidence how he came there, before receiving damages for the injury.

Hill *v.* New Haven, 37 Vt. R. 501, 509.
Gahajan *v.* Railroad Co., 1Allen R. 187.
Telfer *v.* Railroad Co., 30 N. J. R. 188.

A very judicious and sensible view of the care which a railway company must exercise, in the running of trains, so as not to injure property situated near their track, was taken in the Michigan Central Railroad Company *v.* Anderson, 20 Mich. R. 244, where the facts in regard to the force and direction of the wind, the dryness of the weather, and the combustible character of the property destroyed, were similar in many respects to the facts in our case. The court, there, under objection, charged the jury that regard must be had to the actual state of things at the time; the force and direction of the wind; the dryness of the weather and the proximity of the sorghum factory to the railroad; that what might be ordinary care on a still, wet day, might not be on a windy and dry day, and when near the combustible matter; the question being, what care a prudent man would exercise in precisely similar circumstances.

Campbell, C. J., in delivering the opinion of the court says: "We think the rule laid down is incorrect. Vehicles that can choose their track, and can deviate whenever and wherever it is desired, may properly be required to be used differently, according to circumstances. But the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely. The business cannot be done at all, unless calculations are made upon the movements of trains. And the risks attendant upon a disturbance of that regularity, are risks of human life, and not mere business delays. It would not only be vexatious, but in the highest degree dangerous, to make the movements of cars vary with wind and weather. Those who establish themselves in the neighborhood of railroads, must know that the trains are expected to run with regularity, and if there are special risks arising from no want of care in the proper equipment and management of engines and trains, those risks are not chargeable to the railroad, but are incident to the situation. And the extra care which they demand must therefore devolve upon those whose in-

terests require the increased vigilance; and the consequences of not exercising it must fall upon the owner, because the railroad is not in fault. We think the judgment must be reversed on this ground."

3. The court refused to give the jury our third request, (Record, folio 59) which was as follows:

"That the statute upon which the action is predicated does not apply to property located within the limits of the railroad, nor to personal property temporarily on hand."

Herein was also error.

The first branch of this request has already been considered in this brief. (*Ante*, Point V.)

The case of Chapman *v.* Railroad Co., 37 Maine R. 93, is a direct authority that such statutory liability only extends to property of a permanent nature, and upon which an insurance may be effected; and that for injuries of this kind to other property the company will only be responsible for negligence, unskilfulness, or imprudence in running and conducting their locomotives.

1 Redfield on Railways, (3 Edit.) Sec. 126, p. 456.

Pratt *v.* Railroad Co., 42 Me. R. 579.

## VIII

The instructions to the jury cannot be sustained.

The court charged the jury "that the burden of proof was upon the plaintiffs in the first instance, to show that the fire in question was communicated from some of defendants locomotive engines to the bridge; and that if the jury were satisfied of that fact by a fair balance of evidence, then plaintiffs were entitled to recover, unless the defendants had established by a fair balance of evidence that they had used all due caution and diligence, and had employed all suitable expedients to prevent the fire; that the burden of proof was on the defendants as to this latter branch of the case," to which exception was taken. (Record, folio 60.)

The burden of proof did not shift, but remained with the defendants in error throughout the trial. They were bound to prove negligence on the part of the corporation, as well as the communication of the fire.

If we are correct in our position that the defendants in error, under the peculiar circumstances of this case, cannot call to their aid the two sections of the local law of Vermont, before alluded to, which are in derogation of the common law—entirely shifting the burden of proof from the plaintiff to the defendant upon the important matter of negligence—then there was a fundamental error running through the whole course of the trial.

Ossian Ray
of Counsel

# Supreme Court of the United States.

*No. 91*

THE GRAND TRUNK RAILWAY COMPANY,
Plaintiffs in Error,

*vs.*

ROSWELL M. RICHARDSON *et al.*, Defendants in Error.

*Assignment of Errors arising on the bill of exceptions, and relied upon by the Plaintiffs in Error.*

I. Admitting the testimony bearing upon the question of license—especially the receipt dated October 27, 1870, given to pay land rent for the year ending October 31, 1870.

II. Excluding the testimony offered by the plaintiffs in error, to show that it was not the usual practice among railroads in that section of the country to employ a man to watch bridges, like the one destroyed.

III. Admitting the testimony introduced by the defendants in error, that some of the company's locomotives scattered fire at various times during the same summer, before the fire, when passing the saw-mill, without showing that either of the two, which were claimed to have communi-

cated the fire complained of, was among the number, and also without showing that either was similar in construction, state of repair, or management, to those which scattered fire as aforesaid.

IV. Admitting the evidence bearing upon the claim of the defendants in error to recover the value of the boards and headings piled upon and near the company's roadway.

V. Denying the motion of plaintiffs in error, that a verdict be ordered in their favor; (1) because a large portion of the property sued for was wrongfully on their roadway; (2) because the statutes of Vermont, upon which the defendants in error claimed and were allowed to recover, have no application to property injured or destroyed within the roadway limits. The motion was renewed when the evidence was all in.

VI. A verdict should have been ordered for the plaintiffs in error, because the damages claimed were too remote. At all events, there was error in not submitting the question whether the damages were too remote, or otherwise, to the jury.

VII. In not charging the jury as requested, viz:

1. If the jury find that the erection of plaintiffs' buildings or the storing of plaintiffs' lumber so near to the defendant's railroad track, as the testimony shows, was an imprudent or careless act, and that such a location of this property in any degree contributed to the loss which ensued, then plaintiffs cannot recover even though the fire was communicated by defendant's locomotives.

2. That at all events, under the circumstances disclosed in this cause, it was incumbent upon plaintiffs to use due caution and diligence, and to employ suitable expedients to prevent the communication of fire.

This request should have been given without the qualification "that there was no evidence in the case to which it had any application."

3. That the statute upon which the action is predicated does not apply to property located within the limits of the railroad, nor to personal property temporarily on hand.

VIII. In addition to the error in not submitting the question whether the damages claimed were too remote or otherwise to the jury, there was also error in charging that the burden of proof was upon the plaintiffs in error to show the exercise of all due caution and diligence, and the employment of all suitable expedients to prevent the fire.

IX. Denying our motion to set aside the verdict and grant a new trial.

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